

MAY 2 1 1987

THE CHRISTIAN SCIENCE MONITOR

Iran-Contra Probe

Reagan's view of law called into question

By Charlotte Salkowald
Staff writer of The Christian Science Monitor

P.3

President Reagan's new line of defense on the Iran-contra affair is generating lively debate among legal experts about who is responsible for American foreign policy.

Many constitutional scholars and lawmakers are nonplused by Mr. Reagan's assertion that he has not violated a law of Congress - the Boland amendment - because the law does not apply to him. Others say they think the law is ambiguous and open to differing interpretations.

Among the issues stirring controversy are these:

- Does the Boland amendment, which banned military support for the Nicaraguan contras in 1985 and '86, unconstitutionally restrict the President's power to conduct foreign policy?

- Does the Boland amendment apply to the President in any case, since it deals specifically with intelligence agencies?

- Does it apply to the National Security Council (NSC), which is not named?

- In particular, does it prohibit the President from soliciting funds for the contras?

As the Iran-contra hearings have shed more light on Reagan's involvement in the Iran-contra affair, his lawyers have shifted his defense in a way that seems designed politically to rekindle the image of a strong presidency and, legally, to avoid any charge that Reagan may have been involved in a conspiracy to violate the law.

In the beginning Reagan claimed to have little knowledge of the private contra-resupply operation, thereby eliciting criticism about his laid-back manage-

REAGAN from front page

ment style. But in recent days he has taken the tack that he in fact knew about the operation and that the private aid effort "was my idea to begin with." The Boland amendment, he says, limits the constitutional power of the President to make foreign policy and does not apply to him or to the NSC, an agency of the executive branch.

Many legal experts challenge this position.

Shaking foreign policy

"The Founding Fathers set up shared powers in foreign policy," says David O'Brien, a constitutional scholar at the University of Virginia. "A lot of action in foreign affairs was handed to the president, but Congress has the right to limit his action. Congress ultimately makes the law and appropriates money, and it's disingenuous for the administration to claim otherwise now."

Clark Clifford, a lawyer who has served many Democratic administrations, notes that there is nothing in the Constitution that gives foreign policy powers solely to the president.

"If you read Madison and Hamilton and the early papers, you see it's a joint responsibility that Congress and the president have... and sometimes a decision is made by the judicial branch," he says.

Other experts view the issue differently. Walter Bennis, a legal scholar at the American Enterprise Institute, faults Reagan for not making a statement about the Boland amendment when he signed it into law as part of the defense authorization bill.

"He could have said that he is signing the bill but will not be guided by the amendment," Dr. Bennis says. "He failed

Continued

to do that."

But, he adds, the amendment itself is unconstitutional, because it interferes with the president's management of foreign policy. Congress wavers back and forth on the contra-aid issue, he argues, and a president must act in what he regards as the national interest. "What should the White House do if it's persuaded that US national security depends on stopping the Sandinistas?" he asks.

Berns and others point to the fact that presidents have sometimes ignored the law in the interests of national defense. Franklin Roosevelt, for instance, provided aid to Britain before World War II and authorized US destroyers to fire on German submarines, in contravention of existing law.

"He was taken off the hook by the Japanese," Berns says.

On the narrower issue of whether the Boland amendment applies to the President, there are also differing views.

In the opinion of many lawyers, the statute does apply to the NSC, since it prohibits the Central Intelligence Agency, the Defense Department, and "any other agency or entity of the United States involved in intelligence activities" from directly or indirectly supporting the contras.

NSC as intelligence branch

Congress may not have foreseen that the NSC would engage in secret intelligence activities. But, experts say, the legislators' intent was to bar any government agency from helping the contras.

Further, it is argued, as the President is the presiding member of the NSC, which is an executive agency set up to help him in policymaking, the amendment

also applies to him.

"If the NSC engages in improper activity, it cannot do so without members of the NSC ordering it - unless they simply do not care," says Mr. Clifford, who helped draft the 1947 National Security Act setting up the NSC.

"The President cannot shrink from the fact that, as the decisionmaker of the country, he is aided by the NSC. . . . There is no way you can separate him from the NSC."

"I don't see how the President can detach himself from the NSC, since it is his instrumentality for bringing together all agencies for the conduct of foreign affairs," concurs W. T. Mallison, a legal expert at George Washington University.

"If he tells them directly to aid the contras, or simply creates a permissive environment for them, the result is the same, and he must take the responsibility."

Some legal analysts further argue that President Reagan was covered by the Boland measure, since he is involved in intelligence activities and

makes use of his office, the telephone, and other government amenities to promote these activities. The amendment specifies that no funds "available" to intelligence agencies may be used to support the contras. At the very least, these analysts say, Reagan violated the spirit of the amendment, the purpose of which was to stop help for the contras.

But to other experts the issue of whether the Boland statute applies to the President is ambiguous.

Lloyd Cutler, former counsel to Jimmy Carter, agrees that the amendment applies to the NSC, but he says it is not clear that it applies to the President, because

he is not mentioned and because many congressional laws do specifically place restraints on the President.

"That question is more open to doubt," Mr. Cutler says.

Constitutionality of Boland

Cutler further suggests that the Boland statute may raise constitutional problems if it is interpreted to deny a president certain powers - for instance, the right to receive the representative of any government and talk about support for the contras (as Mr. Reagan did in the case of King Fahd of Saudi Arabia).

"A ban against this violates Article II of the Constitution," Cutler says. "He can receive ambassadors as long as he doesn't commit US money. So there's an open question on the solicitation of funds."

Adding to confusion over legal points is the fact that there are five versions of the Boland amendment, passed at various times between 1982 and 1986. The key version is the amendment for fiscal 1986 which barred all direct or indirect US military support for the contras. In fiscal 1986 the statute prohibited all military aid but approved \$27 million for humanitarian assistance.

Reagan says he was not involved either in the diversion of profits from the Iran arms sales to the contras or in efforts to solicit funds for supplying arms to the contras. According to White House officials, the latter activity is not unlawful in any case.

Whether the courts are ultimately asked to resolve the constitutionality of the Boland amendment remains to be seen. By and large courts have preferred that the legislative and executive branches work out their own disputes.

"Every law is 'ambiguous' when it is politically opportune to say it is," says Professor O'Brien at the University of Virginia.